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No. 72-1597

In the Supreme Court of the United States

OCTOBER TERM, 1973

ULYSSES VERNON BEASLEY, ET AL., PETITIONERS

v.

FOOD FAIR OF NORTH CAROLINA, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD AS AMICUS CURIAE

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INTEREST OF THE NATIONAL LABOR RELATIONS BOARD

This case involves the question whether the National Labor Relations Act preempts a state court suit for damages brought by supervisors against their employer under a state right-to-work law based on their discharge for union activity. The National Labor Relations Board, which is charged with the responsibility for administering the National Labor Relations Act, believes that permitting such a suit would impair Congress' objective in removing supervisors from the Act's protection, and accordingly that the suit is preempted.

530-320—74——1

STATEMENT

Petitioners were meat market managers employed by the respondent Food Fair of North Carolina (the "Company") at its Winston-Salem stores. In the Spring of 1971, Local Union No. 525 of the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL–CIO (the "Union") began an organizing campaign among the meat department employees at those stores, and the petitioners signed union membership cards. Pursuant to the Union's request, the Board ordered that a representation election be held. The Board found that the meat market managers were "supervisors" and excluded them from the bargaining unit. The Union won the election, and was certified as the bargaining representative of the meat department employees. A few days later, the petitioners were discharged by respondent Messick, president of the Company (A. 2, 9–12).[1]

The Union filed charges with the Board alleging that the discharge of the petitioners was an unfair labor practice, in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Regional Director dismissed the charges, and the Union appealed to the General Counsel of the Board. The General Counsel denied the appeal on the ground that petitioners were "supervisors" (Section 2(11), 29 U.S.C. 152(11)), and hence not entitled to the protection of the Act (A. 4–5, 13).

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[1] "A." refers to the appendix to the briefs; "Pet. App." refers to the appendix to the petition.

Meanwhile, the petitioners filed suit in the Forsyth County Superior Court of North Carolina, alleging that their discharge for support of and membership in the Union violated the North Carolina Right-to-Work Law, G.S. 95–78, *et seq.*[2] They sought $300,000 in actual damages, and $1,000,000 in punitive damages[3] (A. 2–3). The trial court found that the petitioners failed to state a claim upon which relief could be granted and entered summary judgment for the Company (A. 14–15).

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[2] The North Carolina General Statutes provide, in relevant part, as follows:

"Section 95–78. *Declaration of public policy.*—The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association" (A. 16).

* * * * *

"Section 95–81. *Nonmembership as condition of employment prohibited.*—No person shall be required by an employer to abstain or refrain from membership in any labor union or labor organization as a condition of employment or continuation of employment" (A. 17).

[3] Section 95–83 of the North Carolina General Statutes provides:

"*Recovery of damages by persons denied employment.*—Any person who may be denied employment or be deprived of continuation of his employment in violation of Sections 95–80, 95–81, and 95–82 or of one or more of such sections, shall be entitled to recover from such employer and from any other person, firm, corporation, or association acting in concert with him by appropriate action in the courts of this State such damages as he may have sustained by reason of such denial or deprivation of employment" (A. 17–18).

The North Carolina Court of Appeals reversed, holding that, since "the activities of supervisors could not be arguably either prohibited or protected under the [National Labor Relations] Act," state courts were not preempted from regulating those activities. The court further ruled that supervisors were "persons" within the meaning of the state Right-to-Work Law, notwithstanding that this conclusion would "seriously weaken the position of management, and create a severe imbalance between labor and management" (A. 28–29).

The Supreme Court of North Carolina reversed, holding that the suit is preempted (Pet. App. A1–A18). The court noted that the 1947 amendments to the National Labor Relations Act removed supervisors from the definition of "employee," and that, as a result, the "federal courts have consistently held that a supervisor is not protected under the statute from discharge due to union membership or activity" (Pet. App. A9).[4] These federal cases, the North Carolina Supreme Court added, "recognize the existence of the legislative intent on the part of Congress to leave employers unfettered in dealing with union affiliation

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[4] The supreme court cited, *inter alia: National Labor Relations Board* v. *Big Three Welding Equipment Co.*, 359 F. 2d 77 (C.A. 5); *National Labor Relations Board* v. *Charley Toppino and Sons, Inc.*, 332 F. 2d 85 (C.A. 5); *Oil City Brass Works* v. *National Labor Relations Board*, 357 F. 2d 466 (C.A. 5); *National Labor Relations Board* v. *Griggs Equipment, Inc.*, 307 F. 2d 275 (C.A. 5); *National Labor Relations Board* v. *Fullerton Publishing Company*, 283 F. 2d 545 (C.A. 9); *National Labor Relations Board* v. *Inter-City Advertising Co.*, 190 F. 2d 420 (C.A. 4), certiorari denied, 342 U.S. 908.

on the part of their supervisory personnel" (Pet. App. A10). On the preemption question, the North Carolina Supreme Court recognized that, in addition to conduct arguably protected or prohibited by the National Labor Relations Act, "legislative purpose may further dictate that certain activity 'neither protected nor prohibited' be deemed privileged against state regulation" (Pet. App. A13; quoting *Hanna Mining Co.* v. *District 2, Marine Engineers,* 382 U.S. 181, 187). The North Carolina Supreme Court concluded (Pet. App. A17):

> To permit a state law to deprive an employer of his right to discharge his supervisor for membership in a union would completely frustrate the congressional determination to leave this weapon of self-help to the employer. Furthermore, the balance of power between labor and management expressed in our national labor policy would be upset. * * *

DISCUSSION

1. In the 1947 amendments to the National Labor Relations Act, Congress removed supervisors from the Act's definition of "employee."[5] Moreover, it provided in Section 14(a) that:

> Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any

[5] See Sections 2(3) and 2(11), 29 U.S.C. 152(3) and (11) (A. 18–19).

> law, either national or local, relating to collective bargaining.

These amendments were designed to provide a solution to the conflict-of-loyalty problem created by the unionization of supervisors. Supervisors were free to join unions and to bargain through them if the employer was willing; on the other hand, the employer could insist that his supervisors not join unions and discharge them if they did.

Thus, the House Report states:

> The evidence before the committee shows clearly that unionizing supervisors under the Labor Act * * * is inconsistent with our policy to protect the rights of employers; they, as well as workers, are entitled to loyal representatives in the plants, but when the foremen unionize * * * they are subject to influence and control by the rank and file union, and, instead of their bossing the rank and file, the rank and file bosses them. * * *
>
> * * * * * *
>
> The bill does not forbid anyone to organize. It does not forbid any employer to recognize a union of foremen. * * * What the bill does is to say * * * [t]hat no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust. [H. Rep. No. 245, 80th Cong., 1st Sess., pp. 14, 17, 1 Leg. Hist. of the Labor Management Relations Act, 1947 ("Leg. Hist.") 305, 308.]

Similarly, the Senate Report states:

> [T]he bill does not prevent anyone from organizing nor does it prohibit any employer from

> recognizing a union of foremen. It merely relieves employers who are subject to the national act free from any compulsion by this National Board or any local agency to accord to the front line of management the anomalous status of employees. [S. Rep. No. 105, 80th Cong., 1st Sess., p. 5, 1 Leg. Hist. 411.]

During the Senate debate, Senator Taft added:

> The bill provides that foremen shall not be considered employees under the National Labor Relations Act. They may form unions if they please, or join unions, but they do not have the protection of the National Labor Relations Act. They are subject to discharge for union activity, and they are generally restored to the basis which they enjoyed before the passage of the Wagner Act.
>
> * * * The committee felt that foremen either had to be a part of management and not have any rights under the Wagner Act, or be treated entirely as employees, and it was felt that the latter course would result in the complete disruption of discipline and productivity in the factories of the United States. [93 Cong. Rec. 3836, 2 Leg. Hist. 1008–1009.]

Accordingly, as the North Carolina Supreme Court recognized (*supra,* p. 4), the federal courts have consistently held that the National Labor Relations Act affords no protection to supervisors who have been discharged for union activity. Congress intended, in enacting the 1947 amendments, that "employers be free in the future to discharge supervisors for joining a union, and to interfere with their union activities." *National Labor Relations Board* v. *Edward*

G. Budd Mfg. Co., 169 F. 2d 571, 579 (C.A. 6), certiorari denied, 335 U.S. 908. See also *Carpenters District Council, etc.* v. *National Labor Relations Board*, 274 F. 2d 564, 566 (C.A.D.C.).[6]

2. In *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 245, this Court held that "[w]hen an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." In *Teamsters Union* v. *Morton*, 377 U.S. 252, 258, this Court added that, even where the "activity here involved was neither protected nor prohibited, it is still necessary to determine whether * * * 'Congress occupied this field and closed it to state regulation' ". The answer to this question, the Court said (*ibid.*), "ultimately depends upon whether the applica-

[6] However, if the discharge of a supervisor is likely to deter organizational activity by rank-and-file employees, the discharge, because of its interference with the statutory rights of the latter, would violate Section 8(a)(1) of the Act, 29 U.S.C. 158 (a)(1), and the Board would be empowered to order the supervisor reinstated with back pay. See *National Labor Relations Board* v. *Talladega Cotton Factory, Inc.*, 213 F. 2d 209 (C.A. 5); *National Labor Relations Board* v. *Better Monkey Grip Co.*, 243 F. 2d 836 (C.A. 5), certiorari denied, 355 U.S. 864; *National Labor Relations Board* v. *Leas & McVitty, Inc.*, 384 F. 2d 165, 166 (C.A. 4). Cf. *John Hancock Mutual Life Ins. Co.* v. *National Labor Relations Board*, 191 F. 2d 483 (C.A.D.C.). This was the theory of the unfair labor practice charges which were filed in this case, but, after investigation, those charges were dismissed by the Regional Director, and the dismissal was sustained by the General Counsel (*supra*, p. 2).

tion of state law * * * would operate to frustrate the purpose of the federal legislation."

We believe that the North Carolina Supreme Court correctly concluded that to permit a supervisor who has been discharged by his employer for union activity to recover damages against the employer in a state court suit "would operate to frustrate the purpose of the federal legislation" (*Morton, supra*). "The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy." *Garmon, supra*, 359 U.S. at 247. The threat of a state court damage action would tend to deter an employer from exercising his right, which Congress restored in 1947, to insist that his supervisors not join unions or engage in union activity.

Petitioners contend (Br. 12), however, that, while the National Labor Relations Act does not protect supervisors from discharge for union membership, a state remedy for such discharge is permitted by Section 14(a) of the Act. That Section provides: "Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem * * * supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining." Petitioners argue that, since "they do not seek the right to collectively bargain with their employer but simply a remedy for their discharge" (Br. 12), their suit under the North Carolina Right-to-Work Law is not

barred by Section 14(a). This contention does not withstand analysis.

The legislative history of Section 14(a) shows that Congress intended to prescribe a uniform national policy respecting not only collective bargaining by supervisors, but also their organizing into unions, and therefore withdrew not only federal, but any state, protection for both activities.

Thus, the House Report stated:

> It can readily be seen what mischief might be wrought if, for example, foremen should be subject to State law at the same time that the workers they supervise are subject to national law. * * * [T]he bill herewith reported very definitely states a national policy in respect of organization and collective bargaining by foremen. [H. Rep. No. 245, *supra,* p. 40, 1 Leg. Hist. 331.]

The Senate Report stated, with reference to Section 14(a):

> * * * it is contrary to national policy for other Federal or State agencies to compel employers who are subject to the National Board to treat supervisors as employees for the purpose of collective bargaining or organizational activity. [S. Rep. No. 105, *supra,* p. 28, 1 Leg. Hist. 434.] [7]

It would be contrary to this congressional policy to permit supervisors to recover damages under state

[7] See also H. Conf. Rep. No. 510, 80th Cong., 1st Sess., p. 60, 1 Leg. Hist. 564.

law because the employer, exercising his right under the National Labor Relations Act, has discharged them on account of their union membership.[8]

3. *Hanna Mining Co.* v. *District 2, Marine Engineers,* 382 U.S. 181 (Br. 9–11) does not require a contrary conclusion. In that case, the Court held that the National Labor Relations Act did not preclude a Wisconsin state court from enjoining picketing by a union to obtain representation rights on behalf of supervisors. The Court noted that "activity designed to secure organization or recognition of supervisors cannot be protected by §7 of the Act, arguably or otherwise" (382 U.S. at 188), and it found that there was no basis for believing that the picketing "exerted secondary pressure arguably violating §8(b)(4)(B)" (*id.* at 191). The Court rejected the contention that the language in Section 14(a) (*supra,* p. 9) to the effect that supervisors were not prohibited from becoming union members signified "a federal policy of *laissezfaire* toward supervisors ousting state as well as Board authority * * *" (382 U.S. at 189). "This broad argument fails utterly in light of the legislative his-

[8] Congress' action in withdrawing from supervisors the statutory protection against employer discharge for joining a union which was previously accorded presents no constitutional question. While the right of freedom of association encompasses the right to join a union, the Constitution merely protects those rights against governmental, not employer, interference. Restoring supervisors to the position they had, in relation to the employer, prior to the enactment of the Wagner Act does not constitute governmental abridgement of their right of freedom of association. *National Labor Relations Board* v. *Edward G. Budd Mfg. Co., supra,* 169 F. 2d at 577.

tory, for the Committee reports reveal that Congress' propelling intention was to relieve employers from any compulsion under the Act and under state law to countenance or bargain with any union of supervisory employees" (*ibid.*).

Thus, the state court was free to enjoin the picketing in *Hanna*, not merely because the picketing was neither arguably protected nor arguably prohibited by the National Labor Relations Act, but because, in addition, such restraint was consistent with national labor policy. The objective of the picketing in *Hanna* was to pressure the employer to recognize and bargain with a union for supervisors. This was contrary to the national labor policy of leaving employers free from federal, as well as state, compulsion to recognize and bargain with a supervisors' union. The state court injunction, therefore, furthered that policy by relieving the employer of such union pressure.

In contrast, the relief sought from the state court here would be in derogation of national labor policy. For, as a practical matter, it would "deprive an employer of his right to discharge his supervisor for membership in a union" and thereby "frustrate the congressional determination to leave this weapon of self-help to the employer" (Pet. App. A17). Nothing in *Hanna* sanctions the exercise of state power which would so undermine the federal regulatory scheme.

4. Contrary to petitioners' contention (Br. 13–17), Section 14(b) does not authorize the state court to assert jurisdiction in this case. That section provides:

> Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 14(b) "was designed to prevent other sections of the Act from completely extinguishing state power over certain union-security arrangements." *Retail Clerks Ass'n* v. *Schermerhorn,* 373 U.S. 746, 751. It was intended "to assure that nothing in the act was to be construed as authorizing any closed shop, union shop, maintenance of membership, or other form of compulsory unionism agreement in any State where the execution of such agreement would be contrary to State law." H. Conf. Rep. No. 510, *supra,* p. 60, 1 Leg. Hist. 564.

Thus, Section 14(b) creates an exception to preemption of state regulation in relation to union security agreements. It does not, however, permit the states to regulate other union activity. For example, in *National Labor Relations Board* v. *Houston Chapter, Assoc. Gen'l Contractors of America, Inc.,* 349 F. 2d 449, 453, certiorari denied, 382 U.S. 1026, the Fifth Circuit concluded that Section 14(b) did not permit the state to outlaw an exclusive hiring hall arrangement. Similarly in *Sea Pak* v. *National Maritime Union,* 400 U.S. 985, affirming, 423 F. 2d 1229 (C.A. 5), this Court summarily affirmed a lower court decision holding that Section 14(b) did not authorize the state to regulate checkoff arrangements. Accord-

ingly, since no union security agreement is involved, Section 14(b) would afford no basis for the exercise of state authority here.

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of North Carolina should be affirmed.

Respectfully submitted.

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